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Islamic *kafalah* as an alternative care option for children deprived of a family environment

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Summary

The inclusion of kafalah of Islamic law in the United Nations Convention on the Rights of the Child is the first time an exclusively Islamic concept is recognised in a binding international instrument. The drafting of CRC was set against the background of compromise as it relates to the provision of alternative care for children deprived of a family environment. Islamic kafalah represents one of such compromises in an attempt to accommodate the differences of the various state parties to CRC. However, many scholarly works on children's rights refer to Islamic kafalah only within the context of its 'discovery' during the drafting process of CRC and, as such, the meaning, extent and practice of kafalah, as an alternative care option for children deprived of parental care, has not been the subject of much study. This is unlike the case with other forms of alternative childcare like foster care and adoption. Other studies more focused on Islam and human rights refer to kafalah only within the broader context of discussing the links and divergences between Islamic law and human rights, or children's rights more specifically. This article specifically focuses on kafalah as an alternative care option for children deprived of a family environment in comparison with other forms of alternative childcare. The extent to which kafalah is internationally

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recognised and practised is also addressed. A number of themes are analysed in the article, including what the concept of kafalah entails, what its legal implications are, what factors distinguish it from other forms of alternative care, and what the international dimensions to kafalah are in relation to the subject of intercountry adoption. In light of all these questions, an understanding of kafalah will contribute to international children's rights jurisprudence in the context of child care and protection.

Key words: kafalah; alternative care; family environment; adoption; children's rights

1 Introduction

The United Nations Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (African Children's Charter), the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) and the 2009 United Nations Guidelines for the Alternative Care of Children (UN Guidelines),¹ among others, all place a high premium on the need for children to grow up in a family environment. This is a necessary precondition for the full and harmonious development of a child's personality.² Against this background, CRC, the African Children's Charter and the UN Guidelines give an additional level of assistance and protection to children deprived of their natural family environment.³ This is justifiable in light of the fact that children who lack the security of a family are more vulnerable to the violation of all other rights that they are entitled to as children and rights-bearing individuals in society.⁴

Children deprived of a family environment include orphans, street children and abandoned children generally, whether or not in institutional care, and their number runs into millions the world over.⁵ The phenomena of HIV and AIDS, armed conflict and poverty, among others, have resulted in millions of orphans and destitute children in Africa.⁶ States have an obligation to provide alternative care for these children,⁷ and the mechanisms for ensuring this as contained in CRC,

1 UN General Assembly, A/RES/64/142, 2010.

2 Para 4, Preamble to the African Children's Charter; para 6, Preamble to CRC; para 1, Preamble to the Hague Adoption Convention.

3 Art 20 CRC; art 25 African Children's Charter.

4 Art 4 UN Guidelines.

5 LM Shapiro 'Inferring a right to permanent family care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and selected scientific literature' (2008) 15 *Washington and Lee Journal of Civil Rights and Social Justice* 194. See also CRC Committee, General Comment 6, 2005.

6 T Davel 'Intercountry adoption from an African perspective' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 257.

7 Art 20(2) CRC; art 25(2)(a) African Children's Charter; para 5 UN Guidelines.

the African Children's Charter and the UN Guidelines include adoption, foster care, institutional placement and Islamic *kafalah*.⁸ This article analyses Islamic *kafalah* as an alternative care option for children deprived of a family environment in comparison to other forms of alternative childcare.

2 Recognition of Islamic *kafalah* in international law

The inclusion of *kafalah* in CRC is the first time an exclusively Islamic concept is recognised in a binding international instrument.⁹ Prior to this development, however, *kafalah*, as a subject of international law, was first mentioned in the 1986 UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration).¹⁰ The 1986 Declaration contains the first internationally agreed upon standards of care for children whose parents are 'unavailable' or 'inappropriate'.¹¹ *Kafalah* is also recognised in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.¹² It is provided as one of the measures that can be taken to ensure the 'protection of the person or property of the child'.¹³ In the UN Guidelines, *kafalah* is recognised as an 'appropriate and permanent solution' for children who cannot be kept in, or returned to, their original families.¹⁴ In effect, *kafalah* can be regarded as an internationally-recognised form of alternative care for children deprived of their natural family environment as well as one of the measures for providing 'a global system for improving the protection of children in international situations'.¹⁵

During the drafting process of CRC, the inclusion of adoption as a form of alternative care generated debates from Islamic states' delegates due to the prohibition of adoption under Shari'a.¹⁶ Although adoption was recognised and practised in Arabic societies

8 Art 20(3) CRC; art 25(2)(a) African Children's Charter.

9 G van Bueren *The international law on the rights of the child* (1995) 100; art 20(3) CRC.

10 <http://www.un.org/documents/ga/res/41/a41r085.htm> (accessed 6 August 2013).

11 N Cantwell & A Holzscheiter 'Article 20: Children deprived of their family environment' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008) 16.

12 http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70 (accessed 6 August 2013).

13 Art 3(e) 1996 Hague Convention on Parental Responsibility and Child Protection.

14 Para 2(a) UN Guidelines.

15 N Lowe 'The Jurisdictional Rules under the 1996 Hague Convention on the Protection of Children' (2010) *Journal of Family Law and Practice* 14.

16 The first objection was raised by the permanent representative of Bangladesh, stating that adoption would result in complex problems relating to inheritance

before the introduction of Islam, it was eventually abolished.¹⁷ Consequently, the inclusion of *kafalah* as an alternative care option in CRC was a compromise, in order to accommodate the cultural and religious differences of the various state parties to CRC.¹⁸ Article 21 of CRC on adoption was initially drafted to read that '[s]tate parties ... shall undertake measures, where appropriate, to facilitate the process of adoption of the child'.¹⁹ The implication of this was that states *must* put in place mechanisms for adoption. This was hardly acceptable to the Islamic states, since it meant that states were obligated to provide for adoption in the first place. Eventually, a compromise was reached to the effect that states are not obliged to recognise or set up a system of adoption, by qualifying the provision from the outset. Article 21 of CRC reads: 'States Parties that recognise and/or permit the system of adoption ...'.²⁰ This approach was considered more realistic as it accommodated the various concerns raised, coupled with the fact that adoption is not the only solution for children requiring alternative care.²¹

Since the drafting of CRC, such concerns as to the place of adoption in addressing the right of children without parental care to alternative care have become even more prominent in international policy discourse and international law around adoption and, more particularly, intercountry adoption. The inclusion of *kafalah* in the text of CRC is significant in that it reflects the role of cultural and religious factors in the drafting of international instruments and the place of compromise in resolving differences among state parties.²² However, despite this compromise, some Muslim states ratified CRC with

rights in Islamic jurisdictions. S Detrick *The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires'* (1992) 312.

17 Van Bueren (n 9 above) 95.

18 K Hashemi 'Religious legal traditions, Muslim states and the Convention on the Rights of the Child: An essay on the relevant UN Documentation' (2007) 29 *Human Rights Quarterly* 212; D Johnson 'Cultural and regional pluralism in the drafting of the UN Convention on the Rights of the Child' in M Freeman & P Veerman *The ideologies of children's rights* (1992) 95; Detrick (n 16 above) 26.

19 Detrick (n 16 above) 26; Johnson (n 18 above) 95. Some delegates from Latin America, Asia and Africa also raised objections on grounds of inability to adequately control the process. Another text suggested by Libya was rejected because it contained no guidelines in relation to adoption at all, whether domestic or intercountry. It read that states should, 'in accordance with their domestic law and legislation, provide an alternative family for a child who does not have a natural family'.

20 Art 21 CRC; see also art 24 of the African Children's Charter that uses 'recognise' but avoids 'permit'.

21 Johnson (n 18 above) 104; R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2007) 280; S Vite & H Boechat 'Article 21: Adoption' in Alen *et al* (n 11 above) 19.

22 Johnson (n 18 above) 95; M Sait 'Islamic perspectives on the rights of the child' in D Fottrell (ed) *Revisiting children's rights: Ten years of the UN Convention on the Rights of the Child* (2000) 34; Cantwell & Holzscheiter (n 11 above) 31.

reservations to the adoption provisions.²³ Examples include Egypt, Jordan and the Maldives.²⁴ The CRC Committee has expressed concerns over such reservations since the text of article 21 of CRC makes them unnecessary. The introductory part of article 21 already makes it clear that the provisions on adoption do not apply to these countries.²⁵ Consequently, the CRC Committee has, through its concluding observations on reports from such countries, recommended a withdrawal of the reservations, thereby prompting a review of such reservations by some of the states involved.²⁶

3 Understanding Islamic *kafalah*

3.1 Brief historical background

Adoption was recognised and practised in pre-Islamic Arab societies, whereby the adopted son (legally) became as one born to the adoptive parents. Consequently, the rules of affinity and consanguinity were applicable, in which case marriage between an adopted child and any member of the adoptive family was impossible.²⁷ However, the Prophet Mohammed, himself, once had an adopted son (Zayd), the wife of whom he once had occasion to see unveiled and got attracted to. Subsequently, his adopted son divorced his wife in favour of his father.²⁸ Controversy thus arose among the Prophet's followers concerning the marriage between the Prophet and the divorced wife of his adopted son, subsequent to which a revelation followed that adoption constituted 'no real relationship'.²⁹ According to the Holy *Qur'an*:³⁰

... nor hath He made those whom ye claim [to be your sons] your sons. This is but a saying of your mouths. But Allah sayeth the truth and he showeth the way. Proclaim their real parentage. That will be more

23 AD Gonzalez 'The Hague International Adoption Act and its interaction with Islamic law: Can an imperfect enforcement mechanism create cause for concern?' (2006-2007) *Gonzaga Journal of International Law* 10; Hashemi (n 18 above) 219.

24 LJ Leblanc 'Reservations to the Convention on the Rights of the Child: A macroscopic view of state practice' (1996) 4 *International Journal of Children's Rights* 357; A Bisset-Johnson 'What did states really agree to? Qualifications of signatories to the United Nations Convention on the Rights of the Child' (1994) 2 *International Journal of Children's Rights* 399; Gonzalez (n 23 above) 10; Hashemi (n 18 above) 219.

25 The introduction to article 21 of CRC reads; 'States parties that recognize and/or permit the system of adoption ...'

26 Vite & Boechat (n 21 above) 20; Hodgkin & Newell (n 21 above) 294; Hashemi (n 18 above) 221.

27 R Roberts *The social laws of the Qu'ran* (1990) 49.

28 AA Sonbol 'Adoption in Islamic society: A historical survey' in EW Fernea (ed) *Childhood in Muslim Middle East* (1995) 52; Roberts (n 27 above) 50.

29 D Pearl & W Menski *Muslim family law* (1998) 408; Sonbol (n 28 above) 52; Roberts (n 27 above) 50.

30 Ch 4 Holy *Qur'an* 33:4-6, quoted in D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' (2008) 12 *Law, Democracy and Development* 73; Roberts (n 27 above) 50.

equitable in the sight of Allah. And if ye know not their fathers then [they are] your brethren in the faith and your clients.

Thus, the legal conception of adoption as understood in 'Western' laws was abolished. The abolition of adoption further gained support because adoption in pre-Islamic Arabia was practised together with certain acts that were not supported by Islam. For instance, a family could disclaim a member and a person could renounce his biological family. Such practices were popular because adoption into another family was always a possibility.³¹ Such actions were considered unacceptable in the creation of a new Islamic community in Mecca and Medina at the time.³² Consequently, although some scholars argue that adoption in Islam is *mubah* and have called for a reform of Muslim legal traditions to conform to the formal notion of adoption, the general and popular position is that adoption is prohibited in Islam, the practice of which amounts to a sin of apostasy (*kufr*).³³ The eventual inclusion of *kafalah* in CRC reflects the current Islamic populist position on adoption.

3.2 Islamic law and children deprived of a family environment

The first right recognised in Islam is the establishment of parentage through blood ties; all other rights derive from this.³⁴ The most important of such rights are inheritance, custody, fosterage, maintenance and guardianship.³⁵ The family is therefore seen as a shield of defence from the violation of these rights, and as a necessary tool for the wholesome development of children. Consequently, caring for orphans and vulnerable children generally is a key tenet of Islam in order to provide them with the safety and security that a family environment offers.³⁶

Indeed, there is greater agreement between the major Islamic sects³⁷ on the matter of caring for such children than on any other matter of law, and the *Qur'an* provides specially for the subject.³⁸ For instance, upon taking in a 'foundling' (*laqit*), the child must never

31 Olowu (n 30 above) 73; Sonbol (n 28 above) 52.

32 Pearl & Menski (n 29 above) 408.

33 Sonbol (n 28 above) 51; Gonzalez (n 23 above) 4.

34 S Ishaque 'Islamic principles on adoption: Examining the impact of illegitimacy and inheritance related concerns in the context of a child's right to identity' (2008) 22 *International Journal of Law, Policy and the Family* 7; UNICEF and International Centre for Demographic Studies and Research (ICDSR) *Children in Islam: Their care, upbringing and protection* (2005) 12.

35 Van Bueren (n 9 above) xxi.

36 UNICEF and ICDSR (n 34 above) 73-79. In Islam, it makes no difference whether or not these children have parents. The emphasis is on ensuring their sustenance through the provision of basic needs. Poverty is thus a cause for concern in relation to the proper care of children.

37 The Shiah and the Sunni; the basic difference between them lies in the extent of authority of Muslim leaders after the Prophet Mohammed.

38 Roberts (n 27 above) 40.

again be abandoned.³⁹ There is a moral duty and an obligation to render social assistance to children (and adults) who lack the basic necessities of life, whether or not they ask for it.⁴⁰ It is also a spiritual duty, the neglect of which renders a person's prayers in vain.⁴¹ Further, traditional records reveal that the Prophet Mohammed once declared:⁴²

Do you like your heart to be tender, and your wishes fulfilled? Be merciful to the orphan. Touch softly his head, and feed him from your food. Your heart will be tender and you will attain your wishes.

Another *hadith*⁴³ on the injunction to treat orphans and abandoned children with kindness, mercy and dignity states:⁴⁴

A person who touches with compassion the head of an orphan will be rewarded for each hair his hand touches. Whoever treats kindly a female or male orphan who is under his sponsorship [*kafalah*], I shall be his companion in Paradise.

In the words of the Prophet, 'I and the person who looks after an orphan and provides for him, will be in Paradise like this' (putting his index and middle fingers together).⁴⁵ To be acceptable, such good deeds must be based on the correct intention (*niyyah*), which is to do it with sincerity and without ulterior motives.⁴⁶

Many legal precepts revealed to and established by the Prophet Mohammed came in response to the circumstances of the time, thereby making pragmatic leadership and proactive solutions possible.

39 JJ Nasir *The Islamic law of personal status* (2002) 155. 'A foundling is a newborn baby, abandoned by its parents on grounds of poverty or shame [or young child found in the street and who does not know his family] and so unable to fend for itself. Care of a foundling is a religious duty, if there is any risk that the baby might otherwise die.'

40 Olowu (n 30 above) 68.

41 Sait (n 22 above) 43.

42 Related by Abu-Al-Darda, al Tabanani, quoted in M Hassan *Islam: Its conception and principles* (undated) 113 and in Olowu (n 30 above) 67.

43 While the *Qu'ran* represents the primary and most authoritative source of Islamic law because it is based on the revealed word of Allah, *hadith* refers to the individual reports on the practices of the Prophet by his closest family members and companions. These reports are collectively known as the *Sunnah* and are considered a secondary source of Islamic law. A third source is the *ijma*, which are legal rules agreed upon by a consensus of opinions of learned Islamic scholars within the Muslim community at large. The *ijmas* are relied upon in matters where no clear or direct injunction can be found in the *Qu'ran* or the *Sunnah*. The final source of Islamic law is the *qiyas*. These are analogies, inferences and deductions drawn from time to time by Islamic jurists in the resolution of issues that are not dealt with by any of the other sources.

44 Al-Tabarani in Al-Mu'jam al-Kabir 8/239 *Hadith* 7821, on the authority of Abu Umama in UNICEF and ICDSR (n 34 above) 76.

45 *Hadith* narrated by Sahl bin Sa'd (ra); see 'Good deeds: 1000 keys to paradise No.4: Look after orphans' <http://1000gooddeeds.com/2009/08/24/4-lookafterorphans/> (accessed 7 August 2013).

46 As above.

In relation to children deprived of a family environment, for instance,⁴⁷

[t]he fact that increasing numbers of Muslim males fell in battle [the Battle of Uhud] acted as a catalyst to the verses which enjoined kindness to orphans while retaining the practice of polygamy.

Also, the early life of the Prophet, having himself been left a destitute orphan, greatly influenced the emphasis on caring for orphaned children.⁴⁸

3.3 Meaning and implications of Islamic *kafalah*

The term *kafalah* is traced to the Islamic law of obligations, which 'permits a person to enter into a contract committing himself to certain undertakings in favour of another person provided that person has a material or moral interest in such undertaking'.⁴⁹ Through *kafalah*, a family takes in an abandoned child, a child whose natural parents or family are incapable of raising him or her or who is otherwise deprived of a family environment, without the child being entitled to the family name or an automatic right of inheritance from the family.⁵⁰ By definition, *kafalah* is 'the commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way as a father would do it for his son'.⁵¹

However, the *Qur'an* is very specific on the matter of property and wealth distribution through inheritance and they devolve on the basis of blood relationship only. There are specific allotments for each member of the family and an individual can only control the inheritance of about one-third of his property or estate.⁵² Apparently, the *Qur'an* did not contemplate an automatic right of inheritance through adoption in relation to the non-biological children or members of the family. Consequently, *kafalah*⁵³

creates the following effects: exercise of the parental authority and the obligation of maintenance of the caregiver on the one hand, and persistence of the family bonds and preservation of the child's family status on the other.

In other words, *kafalah* is the provision of alternative care without altering the child's original kinship status because in Islam; the link

47 Pearl & Menski (n 29 above) 3.

48 Sonbol (n 28 above) 50-54.

49 Olowu (n 30 above) 54.

50 Van Bueren (n 9 above) xxi.

51 Art 116 Family Code of Algeria, quoted in ISS/IRC 'Fact Sheet No 50: Specific case: KAFALAH' (2007) 1 http://www.iss-ssi.org/2009/assets/files/thematic-facts-sheets/eng/50.Kafala_eng.pdf (accessed 7 August 2013).

52 Sonbol (n 28 above) 48-50.

53 ISS/IRC (n 51 above) 1.

between an adopted child and his biological parents must remain unbroken.⁵⁴

Nonetheless, children taken into families under *kafalah* are not left out of the property distribution process as the *Qur'an* enjoins Muslims to assign portions of their wealth to others who, though unrelated to them by blood, are equally dependent on them. Consequently, such persons are provided for from the required one-third portion of an individual's personal estate, which is subject to the owner's prerogative and which can be exercised through a will or given as an outright gift (*sadaqa*).⁵⁵ For instance, the *Quranic* injunction 'and in their wealth, there is acknowledged right for the needy and destitute' (or 'and those sworn to you leave them their share') has been interpreted to mean a duty to 'render assistance to every needy person, *including children*, who lack the basic necessities of life'.⁵⁶ Consequently, although a child adopted under *kafalah* has no legal right to inherit from the adoptive family, in practice such a child is assigned an inheritance through testamentary succession. This is a deliberate attempt at ensuring equality between natural and adopted children, thereby minimising the differences between adoption and *kafalah*.⁵⁷ This is significant because the practice of *kafalah* does not permit discrimination between *kafalah* children and those born to the household in order to avoid a sense of deficiency or inferiority in the former.⁵⁸ *Kafalah*, which presupposes an 'unlimited entrustment' of a child to a new family, is the highest form of protection and alternative care for orphans and abandoned children in Islam.⁵⁹ It also represents a form of social security for such children.⁶⁰ More significantly, *kafalah's* unlimited nature results in a permanent bonding relationship between the child and the family in question. The child becomes a part of the family and is raised in the same manner as the natural children of the family.⁶¹ This is important since *kafalah* is seen not only as a meritorious deed, but also as a religious duty.

In the practice of *kafalah*, a child is usually placed in a family that is as closely related to his natural family as possible without the new parents totally displacing the original parents. Thus, there are three features which distinguish *kafalah* from adoption: non-severance of

54 K Nundy 'The global status of legislative reform related to the Convention on the Rights of the Child' (2004) vii http://www.unicef.org/policyanalysis/files/The_Global_Status_of_Legislative_Reform_Related_to_CRC.pdf (accessed 7 August 2013); Hashemi (n 18 above) 221.

55 Sonbol (n 28 above) 48-50.

56 Sonbol 54.

57 Hashemi (n 18 above) 219. Sudan and Jordan are examples of states where this practice is established.

58 Sonbol (n 28 above) 44.

59 Niels 'The new frontiers of placement: Kafalah, European adoption and international placement' (2007) 1 <http://poundpuplegacy.org/node/7258> (accessed 7 August 2013).

60 Sonbol (n 28 above) 64.

61 Sait (n 22 above) 38.

family ties; non-transference of inheritance rights; and no change in the child's family name.⁶² The new family takes care of the child as an act of personal charity or for compensation, depending on the circumstances of the case.⁶³ Thus, not all children deprived of a family environment have to be poor before being eligible for *kafalah*; *kafalah* was not always based on charity. For example, one means of rewarding men who survived the battle of *Uhud* was by allowing them to take responsibility over wealthy orphans and control their wealth.⁶⁴ However, given that the context has changed over time, the emphasis is on providing a family-based alternative care for orphans and other abandoned children because they are destitute and require proper care and attention for proper overall development. As such, *kafalah* is, in the main, a primary moral obligation for Muslims towards such children.⁶⁵

3.4 *Kafalah* compared to other alternative care options

In providing for alternative care options, CRC, the African Children's Charter and the UN Guidelines give priority to family-based options such as foster care, *kafalah* and adoption while making institutional care a subsidiary option where necessary, thereby making it a secondary form of alternative care in the hierarchy of options.⁶⁶ Although the idea of ranking is contested in international law, the apparent priority given to family-based options serves to underscore the importance of a family environment to the proper development of the child.⁶⁷ Further, the options listed prior to institutional placement are ranked in order of permanence, that is, from the least permanent form of alternative care to the most permanent.⁶⁸ The principle of the best interests of the child, however, remains the primary focus in any circumstance.

While article 25 of the African Children's Charter does not expressly make reference to *kafalah* as one of the alternative care options, like article 20 of CRC, the wording of the former suggests that the care options listed are non-exhaustive.⁶⁹ By implication, therefore, *kafalah* falls within the scope of article 25 of the African Children's Charter since *kafalah* represents a family-based form of alternative care.

62 ISS/IRC (n 51 above) 1.

63 Olowu (n 30 above) 73.

64 Sonbol (n 28 above) 54; Pearl & Menski (n 29 above) 3.

65 Sonbol 55.

66 Art 20(3) CRC; art 25(2)(a) African Children's Charter; Cantwell & Holzscheiter (n 11 above) 16. The use of the phrase 'if necessary' before listing or permitting institutional placement is indicative of this.

67 Cantwell & Holzscheiter (n 11 above) 19.

68 The order provided in art 20(3) of CRC reads as follows: 'foster care', '*kafalah*' and 'adoption'.

69 Art 25(2)(a) of the African Children's Charter ACRWC provides that alternative family care 'could include, *among others*, foster placement, or placement in suitable institutions for the care of children'. See also art 20(3) of CRC.

3.4.1 *Kafalah* and foster care

Foster care is a system of care whereby children deprived of parental or family care are placed in the care of individuals to whom they are unrelated. In recent times, however, foster care has evolved to include care by relatives of the child in question. This is known as 'kinship foster care'.⁷⁰ Historically, placement in foster care was temporary, pending reunification with the family, but has now evolved into an alternative care option that may not be temporary but quite permanent or transformed into adoption.⁷¹ Although fostering covers a wide range of child care arrangements, its unique characteristic is that it does not confer full parental responsibilities upon the foster parents. Generally, parental responsibilities for children in foster care are shared between the state and the foster parents. Consequently, it is essentially a form of social parenting that is subject to legal controls by the state.⁷² Foster care is a specialised state-financed service, particularly in more developed countries, aimed at providing a comprehensive approach to caring for children unable to be cared for by their parents for a period. Thus, there is a wide variety of forms and models of foster care all over the world and they are discussed in a vast array of international literature.⁷³

Kafalah is similar to (long-term) foster care in the conferment of some (not full) parental rights and responsibilities for a child's upbringing in respect of both the person and property of the child.⁷⁴ Further, fostering is recognised and permitted under Islam (unlike adoption) as an alternative care form which is distinct from *kafalah*. However, foster children are not permitted to marry anyone with whom they were fostered, but those adopted under *kafalah* may marry anyone from that family. Both foster and *kafalah* children have no inheritance rights except as *sadaqa* (gift).⁷⁵

3.4.2 *Kafalah* and kinship care

Kinship care refers to 'family-based care within the child's extended family or with close friends of the family known to the child, whether

70 Cantwell & Holzscheiter (n 11 above) 37; DJ Herring 'Kinship foster care: Implications of behavioural biology research' (2008) 56 *Buffalo Law Review* 495.

71 SL Waysdorf 'Families in the AIDS crisis: Access, equality, empowerment and the role of kinship caregivers' (1994) 3 *Texas Journal of Women and Law* 145.

72 A Bainham *Children: The modern law* (1998) 191.

73 L Lee-Jones 'Foster care and social work from the perspective of the foster child' unpublished LLM thesis, University of Cape Town, 2003 11; H Johnson 'Literature review of foster care' (2005) <http://www.crin.org/docs/literature%20review%20of%20foster%20care.pdf> (accessed 12 August 2014). New models of foster care also continue to be developed, eg, the 'cluster foster care' model. See J Gallinetti & J Sloth-Nielsen 'Cluster foster care: A panacea for the care of children in an era of HIV/AIDS or a MCQ?' (2010) 4 *Social Work/Maatskaplike Werk* 486-496.

74 K O'Halloran *The politics of adoption: International perspectives on law, policy and practice* (2009) 9.

75 Sonbol (n 28 above) 64.

formal or informal in nature'.⁷⁶ Kinship care is premised on a broad interpretation of family to include all the people involved in caring for a child, which differs from society to society and even from family to family through a wide range of social relationships.⁷⁷ Traditionally, the extended family comprises everyone related by blood, marriage, and adoption, with older children having a supervisory role to play in the care of younger children in the family.⁷⁸ Kinship care is also based on the assumption that blood relationship is central to the definition of family.⁷⁹

Generally, kinship care is practised informally, either spontaneously or at the request of parents, and places no legal responsibilities on the caregivers.⁸⁰ Consequently, until quite recently, in modern children's statutes there were no specific state obligations to children without parental care who have been informally absorbed into kinship care, since its role and status are not expressly provided for.⁸¹ An exception to this general trend is Namibia where the (draft) Child Care and Protection Act expressly recognises the role and status of kinship care as an alternative care form for children without parental care.⁸²

In recognition of the fact that kinship care is the most widespread form of alternative care for vulnerable children, states are expected to⁸³

devise appropriate means ... to ensure their welfare and protection in such informal care arrangements, with due respect for ... the rights and best interests of the child.

Additionally, the African Children's Charter recognises the role of persons other than parents in the upbringing of children.⁸⁴ This is

⁷⁶ Para 29(c)(i) UN Guidelines.

⁷⁷ M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; SG Rankin 'Why they won't take the money: Black grandparents and the success of informal kinship care' (2002) 10 *Elder Law Journal* 153; GA Paupeck 'When grandma becomes mom: The liberty interests of kinship foster parents' (2001) 70 *Fordham Law Review* 527; A Leonard 'Grandparent kinship caregivers' (2004) 6 *Marquette Elder's Advisor* 149.

⁷⁸ CR O'Donnell 'The right to a family environment in Pacific Island cultures' (1995) 3 *The International Journal of Children's Rights* 90.

⁷⁹ E Bartholet *Nobody's children: Abuse, neglect, foster drift and the adoption alternative* (1999) 2; Van Bueren (n 9 above) xxii.

⁸⁰ International Social Service (ISS) 'A global policy for the protection of children deprived of parental care' 2005 6 <http://www.crin.org/docs/A%20Global%20Policy%20for%20the%20Protection.pdf> (accessed 12 August 2014); Cantwell & Holzscheiter (n 11 above) 19.

⁸¹ ISS (n 80 above) 7.

⁸² See ch 8 of Namibia's draft Child Care and Protection Act; the Bill was approved by cabinet in 2012, and was mentioned during the opening of parliament in February 2013, signifying imminent adoption into law.

⁸³ Para 18 UN Guidelines.

⁸⁴ See art 20 of the African Children's Charter on parental responsibilities.

evidenced by the avoidance of the technical and narrow expression 'legal guardian' in relation to parental responsibilities.⁸⁵

Kinship care has positive values such as promoting continuity in upbringing and family autonomy, especially during family crises such as divorce or separation. It also supports the extended family traditions and the value of keeping siblings together.⁸⁶ However, kinship care has suffered some setbacks (particularly in Africa) due to the weakening of kinship ties, at least in terms of physical proximity, as a result of modernity, disease, poverty and armed conflict, among others.⁸⁷ This increases the necessity for kinship care to be legally recognised and assisted by states in the interest of children who are absorbed in such alternative care. The CRC Committee has advocated state support for kinship care despite the non-recognition of its extent, role and status in domestic and international law and practice.⁸⁸ With the specific inclusion of kinship care in the UN Guidelines and its emergence in modern children's statutes, such as the draft Namibian Child Care and Protection Act, it is expected that states will pay attention to kinship care in terms of support for the protection of the children concerned.⁸⁹ In order to address some of the challenges faced by kinship carers, South Africa and Uganda provide good examples due to the decision that kinship carers should have access to simple procedures conferring necessary parental responsibility on them.⁹⁰

Kafalah is similar to kinship care to the extent that they both generally promote continuity in upbringing in relation to children's cultural and religious backgrounds.⁹¹ This is primarily due to the fact that, in both cases, the closest relatives available usually absorb the children (on an informal, largely spontaneous and unregulated basis). Generally, such relatives usually share several elements (like culture and religion) in common with the children involved. Both *kafalah* and

85 B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law* 25. Compare art 18 of CRC on parental responsibilities.

86 Save the Children UK *Kinship care: Providing positive and safe care for children living away from home* (2007) 3. See also para 17 of the UN Guidelines.

87 P Onyango & S Bali 'Regional practice: The African situation' in J Doek *et al* (eds) *Children on the move: How to implement their right to family life* (1996) 141.

88 The UN Guidelines also serve the purpose of filling this gap (n 1 above).

89 See UM Assim 'Understanding kinship care of children in Africa: A family environment or an alternative care option?' unpublished LLD thesis, University of the Western Cape, 2014.

90 J Sloth-Nielsen & B Mezmur 'HIV/AIDS and children's rights in law and policy in Africa' in Sloth-Nielsen (n 6 above) 286. This makes it easy for such caregivers to make some important decisions, for instance in relation to medical surgery on behalf of the children in their care rather than being prevented by virtue of not being their biological parents or guardians.

91 Art 20(3) CRC; art 25(3) African Children's Charter.

kinship care are thus able to provide stability and continuity for the progressive growth and development of the child.⁹²

3.4.3 *Kafalah* and adoption

Adoption refers to the creation of a legal and permanent parent-child relationship through a child's acquisition of new family ties which are equivalent to biological ties and extinguish (completely or partially) a pre-existing (biological) parent-child relationship.⁹³ *Kafalah*, on the other hand, represents the Islamic alternative to adoption.⁹⁴ However, while Islam places a great premium on raising the child within a family environment, the maintenance of one's identity, traceable to one's natural parents, occupies a more central position. Thus, adoption is considered a phenomenon which blurs natural bloodlines.⁹⁵ By investing an adopted child with legal rights (especially inheritance rights from the adoptive parents), adoption is considered to be a disruption of 'the pattern of family relationships that Islamic law recognises'.⁹⁶

Broadly, adoptions may be 'full' or 'simple', on the one hand, or 'open' or 'closed', on the other.⁹⁷ An adoption is full where the pre-existing parent-child relationship is terminated and the child is fully integrated as part of the new family, including the extended family.⁹⁸ On the other hand, an adoption is simple where the pre-existing parent-child relationship is not terminated, but a new parent-child relationship is established between the child and the adoptive parents, upon whom parental responsibilities for the child are conferred.⁹⁹ There is a growing preference for simple adoptions, particularly in African countries, due to the fact that a complete severance from one's original family background is considered quite alien to the traditional African society.¹⁰⁰

92 Arts 14 & 20 CRC; art 9 African Children's Charter. See also art 7 of the Child Rights Act 2003 of Nigeria which provides, *inter alia*: 'Whenever fostering, custody, guardianship and adoption are at issue, the right of the child to be brought up in and to practice his religion shall be a paramount consideration.'

93 Vite & Boechat (n 21 above) 19. See also D Tolfree *Roots and roots: The care of separated children in the developing world* (1995) 165; Bainham (n 72 above) 205; P Welbourne 'Adoption and the rights of children in the UK' (2002) 10 *The International Journal of Children's Rights* 269; Bartholet (n 79 above) 24.

94 Detrick (n 16 above) 26; Johnson (n 18 above) 95.

95 Pearl & Menski (n 29 above) 408; Detrick (n 16 above) 312; Sonbol (n 28 above) 57.

96 Olowu (n 30 above) 73.

97 Vite & Boechat (n 21 above) 16; W Duncan 'Children's rights, cultural diversity and private international law' in G Douglas & L Sebba (eds) *Children's rights and traditional values* (1998) 17; W Duncan 'Intercountry adoption: Some issues in implementing the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption' in Doek *et al* (n 87 above) 84.

98 Vite & Boechat (n 21 above) 16.

99 Permanent Bureau, Hague Conference on Private International Law *The implementation and operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (2008) 121.

100 Vite & Boechat (n 21 above) 17.

An adoption is considered open where it allows for future informal relations among all parties to the adoption. It is closed where there is no such allowance; usually, the adopting parents and the biological parents do not meet or get to know one another. The facilitators of the adoption usually determine who should adopt the child in question. Closed adoptions are generally on the decrease with open adoptions becoming more popular.¹⁰¹ Further, the closure of an adoption does not preclude the child from seeking to find out about and be reunited with his biological family upon attaining the age of majority. In an open adoption, the adoptive and birth family or parents maintain some contact and relations with each other for the child's benefit. The forms of contact, which can range from letters to visits, are agreed upon by all the parties.¹⁰²

Two features of an adoption can be observed in *kafalah*: permanence and elements of a simple and/or open adoption. As already discussed, *kafalah* creates a permanent bonding relationship between the child and the caregivers and the child is integrated into the new family as though that was the case from the outset. Hence, *kafalah*, like adoption, results in the creation of a new and permanent family relationship. Additionally, as with simple and open adoptions, the child under *kafalah* maintains the legal bond (and a continuing relationship, albeit informally) with his family of origin in terms of identity, coupled with the possibility of remaining vested with a right of inheritance or support in relation to his original family's estate, if any.¹⁰³ However, *kafalah* is distinguishable from adoption in that the process is usually not as formal and rigorous as a formal adoption. In addition, the general rule applicable to adoptions revolves around the severing of links with birth parents and, in fact, many legal systems of the world do not provide for simple adoptions.¹⁰⁴

101 Duncan (1998) (n 97 above) 84.

102 For more information on the types of adoption, see C Craft 'What is an open adoption?' <http://adoption.about.com/od/parenting/f/whlopenadoption.htm> (accessed 6 August 2013); Adoption.com 'Closed adoption' <http://closed.adoption.com/> (accessed 6 August 2013); Vite & Boechat (n 21 above) 17; Duncan (1998, n 97) 17; Duncan (1996, n 97 above) 84.

103 Duncan (1998) (n 97 above) 36; Vite & Boechat (n 21 above) 19.

104 Permanent Bureau (n 99 above) 121. There are studies dealing with a current interest in simple adoptions for varying reasons and the tensions existing among the various competing rights involved in the adoption process. Some examples of this include the right to privacy and identity. For more information on this, see: B Mezmur 'Intercountry adoption in an African context: A legal perspective' unpublished LLD thesis, University of the Western Cape, 2009 186-192; M Freeman 'The new birth right? Identity and the child of the reproduction revolution' (1996) 4 *The International Journal of Children's Rights* 273; R Snow & K Covell 'Adoption and the best interests of the child: The dilemma of cultural interpretations' (2006) 14 *The International Journal of Children's Rights* 109; RJ Simon & A Alstein *Adoption across borders: Serving the children in transracial and intercountry adoptions* (2000); Evan B Donaldson Adoption Institute 'Beyond culture camp: Promoting healthy identity formation in adoption' November 2009 http://adoption.about.com/od/parenting/a/beyond_culture_camp.htm (accessed 6 August 2011); K Evans *The lost daughters of China: Adopted girls, their journey to America, and the search for a missing past* (2000).

4 Islamic *kafalah* in practice: Links with adoption

4.1 *Kafalah* in domestic jurisdictions

Despite the prohibition of adoption in Islam generally, adoption takes place in various alternative forms under the umbrella of *kafalah*.¹⁰⁵ In Bangladesh, Iran and Pakistan, for instance, adoption is recognised as guardianship, under which a child is placed in care of a competent family by judicial decree while ensuring the child's knowledge of his or her paternity.¹⁰⁶ In Syria, the adoption alternative is known as 'filiation', in which case the child must be of unknown parentage or the offspring of an unlawful marriage. This is unlike adoption where one or both parents of the child may be known.¹⁰⁷ However, the use of 'permit/recognise'¹⁰⁸ in relation to adoption under CRC is not redundant because non-recognition of adoption does not amount to it being illegal.¹⁰⁹ For instance, states such as Egypt, Pakistan and Lebanon permit adoption for non-Muslims even though it remains prohibited under the Shari'a for Muslims.¹¹⁰ In practice, permission is not usually given for the adoption of a lost child who is old enough to know his name because it is presumed that the family is in search of him; but those who were lost or abandoned as babies or infants can be adopted. This approach is tied to the need to preserve family lineage through bloodlines. However, the latter category of children is presumed illegitimate in terms of identifiable family bloodlines and since this has an attendant negative social stigma in Islamic society, adoption becomes an option in their case.¹¹¹

In Islamic states that permit adoption (statutorily), there are certain circumstances in which it is permitted even for Muslims to adopt despite the Shari'a and *kafalah*. Egypt is again an example (besides Tunisia, Morocco, Pakistan and other parts of South Asia) where, as a result of the fact that the *Qur'an* is often interpreted to meet the demands of the changing society, adoption (even intercountry) is allowed though on a limited basis. For instance, the outright adoption of an orphan (*yateem*) by a relative is allowed.¹¹² Also, permitting adoption for children of unknown relatives is considered a 'social welfare measure aimed at serving the interests of the abandoned

105 Sonbol (n 28 above) 39; Hashemi (n 18 above) 220.

106 Hashemi (n 18 above) 220.

107 As above. This is without prejudice to the fact that abandoned children whose parents cannot be traced are put up for adoption. Under filiation, however, the fact of unknown parentage (or unlawful marriage) is a precondition for filiation.

108 See art 21 of CRC.

109 Hashemi (n 18 above) 221.

110 Vite & Boechat (n 21 above) 21; Hodgkin & Newell (n 21 above) 294; Hashemi (n 18 above) 221.

111 Sonbol (n 28 above) 60. See also TA Volkman (ed) *Cultures of transnational adoption* (2005) 381.

112 Nasir (n 39 above) 145; Pearl & Menski (n 29 above) 409; Volkman (n 111 above) 390 395.

children'.¹¹³ In other states, like Indonesia, there has been a gradual withdrawal from religious traditions so as to recognise and permit adoption, while some communities in South Asia allow adoption because it is not considered a prohibited practice, but one towards which religion is indifferent (*mubah*).¹¹⁴ However, in some other states like Algeria, Kuwait and Yemen, adoption remains prohibited under both Shari'a and statutory law. It is considered void and without legal effect unless for purposes of bequeathing property or giving a gift, subject to the provisions of a will. In addition, there are legal requirements for *kafalah* applicants to fulfil and *kafalah* may be revoked at any time at the initiative of any of the parties, even the child.¹¹⁵

4.2 *Kafalah* across borders

While the formal recognition of *kafalah* in CRC represents a breakthrough in international law, the institution of *kafalah* is largely unknown, particularly among 'Western professionals'.¹¹⁶ Also, while variations exist in relation to state practice on *kafalah*, the international placement of children under *kafalah* is quite rare except for placements of children with nationals of their home country living abroad, and who are in most cases relatives of the children involved.¹¹⁷

Generally, there are three approaches to international *kafalah*, determined by state law and practice: countries which strictly do not recognise or permit international *kafalah* (Egypt, Iran, Mauritania); countries that deal with international *kafalah* on a case-by-case basis (Algeria, Morocco, Jordan, Pakistan); and countries that provide legislation on adoption or the conversion of *kafalah* into adoption, where relevant (Tunisia, Indonesia).¹¹⁸ The effect of this is that, while adoption is generally rejected in the first category of countries, the notion of *kafalah* at the international level is equally rejected. Thus, children without parental care in such states can only find alternative care within the nation, except if they have relatives who live abroad and who take them in. In the second category, the absence of

113 Pearl & Menski (n 29 above) 409. In Somalia, eg, adoption (in-country and intercountry) is recognised even in the codified Muslim law.

114 Nasir (n 39 above) 145; Volkman (n 111 above) 393; Hashemi (n 18 above) 221; Sonbol (n 28 above) 62.

115 S Besson 'Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) *International Journal of Law, Policy and the Family* 137; Volkman (n 111 above) 387 398. In Algeria, a *kafalah* applicant should be a Muslim having a decent home and under 60 years (male) or under 55 (female). Medical certificates are also required and if the *kafalah* is to be intercountry, a special permission of the relevant court would be attached to the guardianship order.

116 ISS/IRC (n 51 above) 2.

117 As above. See also Olowu (n 30 above) 54.

118 ISS/IRC (n 51 above) 2.

national applications for *kafalah* makes international *kafalah* an option to be considered, provided certain conditions are fulfilled.¹¹⁹ The situation in Morocco is particularly unique due to the fact that attempts have been made to formalise *kafalah* in order to safeguard the practice from abuses more common with *kafalah* at an informal level.¹²⁰ In the third category of countries, despite the prominence of Islamic law, adoption is recognised and permitted, with its full legal consequences, but only for adoptive parents who are nationals residing in the country or abroad, and who are of the same religion as the child.¹²¹

Despite the rarity of intercountry *kafalah*, the practice of *kafalah* internationally is subject to several challenges, chief of which is the lack of acknowledgment of *kafalah* in some (particularly Western) countries. In Italy, for example, it is difficult, if not impossible, for children from Morocco or other Islamic countries to be absorbed by 'an Italian family or a family from their country residing in Italy'.¹²² This is due to the fact that securing the relevant documents for the movement of such children from the authorities of destination countries may prove difficult since those countries do not understand, appreciate or reckon with *kafalah* and the children may find themselves in a state of legal limbo.¹²³ This would in turn impact on the realisation and exercise of other rights of the child, particularly rights that flow from the exercise of parental responsibilities such as consent to medical procedures and freedom of movement.

Generally, these are rights that automatically follow from the completion of a successful adoption process. In the United Kingdom and Canada, for instance, the non-acknowledgment of *kafalah* and the fact that Islamic law generally does not permit adoption have sometimes served as the basis upon which children, adopted under Pakistani law, are refused entry into England and Canada to join their sponsors or caregivers who are settled there.¹²⁴ This is despite arguments by immigration adjudicators that the Islamic *kafalah* is

119 Some of the prescribed conditions in the 2002 Moroccan Law on *kafalah* include the practice of Islam by the *kafalah* caregivers as well as being morally fit, financially able, having no criminal record with regard to crimes against children and having no contagious disease.

120 Y Rabineau 'Le regime de la *kafala* au Maroc et ses consequences au regard de Droit Francais' October 2008 <http://www.jafbase.fr/docMaghreb/FichesRabineau/kafala9.pdf> (accessed 6 August 2013). The Moroccan law on *kafalah* covers some procedural matters such as exist under the 1993 Hague Convention on Intercountry Adoption, eg, the determination of eligibility of the child and the suitability of the *kafalah* caregivers or applicants.

121 ISS/IRC (n 51 above) 2.

122 Niels (n 59 above) 1.

123 A Mens 'Intercountry adoption: Do the existing instruments work?' in S Meuwese et al (eds) *100 years of child protection* (2007) 1.

124 Pearl & Menski (n 29 above) 409.

more or less the same as adoption in Western countries.¹²⁵ However, this position (non-acknowledgment of *kafalah*) has been undergoing gradual changes.

4.3 *Kafalah* and the 1993 Hague Convention on Intercountry Adoption

Intercountry adoption, though a sub-set of adoption, has become the subject of significant interest in recent years. In addition, a separate legal framework regulates its practice, the 1993 Hague Adoption Convention, building on article 21 of CRC on intercountry adoption.¹²⁶ The Hague Adoption Convention was drafted in response to the need to safeguard the best interests of the child in the context of intercountry adoption by guarding against trafficking in children, the commercialisation of the adoption process and all forms of abuse generally.¹²⁷ Consequently, the Hague Adoption Convention provides the measures of implementation for CRC on intercountry adoption.¹²⁸ This is done by setting minimum standards to be complied with by all parties involved in the adoption process, in relation to formal, procedural and other requirements. These include the eligibility of the applicants, the adoptability of the child and counselling of all parties, among others.¹²⁹ The Hague Adoption Convention therefore occupies a central position and plays an important role, given that there is increasingly a high rate of international mobility of children across borders due to factors such as armed conflict, divorce and poverty.¹³⁰ These factors, along with issues to do with illegitimacy, conservative abortion laws and minimal use of contraceptives, make Africa a huge market for the supply of children for intercountry adoption to Western countries. Thus, apart from child protection or humanitarian ideals, intercountry adoption currently has socio-political and socio-economic dimensions to it.¹³¹

¹²⁵ SM Ali 'Establishing guardianship: The Islamic alternative to family adoption in the Canadian context' (1994) 14 *Journal of Muslim Minority Affairs* 202; Pearl & Menski (n 29 above) 410.

¹²⁶ Permanent Bureau (n 99 above) 22.

¹²⁷ See the Preamble and art 1 of the Hague Adoption Convention.

¹²⁸ J Murphy *International dimensions in family law* (2005) 186; O'Halloran (n 74 above) 135; J Sloth-Nielsen *et al* 'Intercountry adoption from a Southern and Eastern Africa perspective' (2010) *International Family Law* 86; Hodgkin & Newell (n 21 above) 280.

¹²⁹ See generally the 1993 Hague Adoption Convention and other works dealing on the specific theme of intercountry adoption and the 1993 Convention, including the history and growth of intercountry adoption such as G Parra-Aranguren 'History, philosophy and general structure of the Hague Adoption Convention' in Doek *et al* (n 87 above) 63; Permanent Bureau (n 99 above); Vite & Boechat (n 21 above); E Bartholet 'What's wrong with adoption law?' (1996) 4 *International Journal of Children's Rights* 263; Hodgkin & Newell (n 21 above); Sloth-Nielsen *et al* (n 128 above); Mezmur (n 85 above).

¹³⁰ CMI Moolhuysen-Fase 'Opening speech' in Doek *et al* (n 87 above) 4.

¹³¹ For more on the socio-political and socio-economic dimensions of intercountry adoption, see: H van Hooff 'A family for every child: International adoption of

Article 2(2) of the Hague Adoption Convention provides that 'the Convention covers only adoptions which create a permanent parent-child relationship' (both simple and full). This is interpreted to mean adoption in the strict formal and legal sense, since the Hague Adoption Convention 'does not cover adoptions which are only adoptions in name but do not establish a permanent [legal] parent-child relationship'.¹³² Consequently, the Hague Adoption Convention excludes other long-term (and permanent) alternative care arrangements like *kafalah*.¹³³ The Egyptian and Moroccan delegates to the 17th session of the Hague Conference on Private International Law in 1993 suggested the inclusion of *kafalah* in the Hague Adoption Convention regime. This was, however, not realised due to the non-availability of statistics on the frequency of intercountry *kafalah* and evidence related to the abuse of the process¹³⁴ during the 1990, 1991 and 1992 Special Commission meetings held prior to the drafting of the Hague Adoption Convention.¹³⁵ To date, there are over 90 contracting states to the 1993 Hague Adoption Convention with a very few Islamic or largely Islamic states included.¹³⁶

Notwithstanding the current status or non-status of *kafalah* under the Hague Adoption Convention, there have been interesting developments in relation to intercountry *kafalah* in recent years. In 2002, Italy ratified the Hague Adoption Convention and it entered into force by Law 476/98. Since *kafalah* was not within the scope of that law, *kafalah* was not acknowledged for purposes of allowing Muslim children adopted from Morocco or elsewhere to be united

American children in the Netherlands' 2010 <http://poundpuplegacy.org/node/42574> (accessed 6 August 2013); LA Serbin 'Research on international adoptions: Implications for developmental theory and social policy' (1997) 1 *International Journal of Behavioural Development* 83; L Kislinger 'Inter-country adoption: A brief background and case study' undated <http://www.adoptionpolicy.org/pdf/backgroundCS.pdf> (accessed 6 August 2013); Mezmun (n 85 above) 475.

132 Art 2 1993 Hague Adoption Convention; G Parra-Aranguren 'Explanatory report on the Hague Convention' 1994 <http://www.hcch.net> (accessed 6 August 2013).

133 Duncan (1996) (n 97 above) 84; O'Halloran (n 74 above) 168. The decision to exclude *kafalah* from the Hague Convention regime was also premised on a need to avoid definitional problems with regard to varying forms of alternative childcare. However, the 1993 Hague Adoption Convention provides in its article 4(b) that intercountry adoption can only be considered after alternative care options within the child's state of origin have been attempted without success.

134 The CRC Committee has more recently raised concerns about the practice of *kafalah* in some states such as Egypt, Jordan, Syrian Arab Republic and Brunei Darussalam. The concerns have to do with difficulties with implementing the law on *kafalah* and a violation of the non-discrimination principle of children's rights. The discrimination is evidenced by the fact that 'in practice more girls than boys benefit from *kafalah*'. See Hodgkin & Newell (n 21 above) 281.

135 Permanent Bureau (n 99 above) 22; Gonzalez (n 23 above) 6; Duncan (1996) (n 97 above) 86; Duncan (1998) (n 97 above) 32; Vite & Boechat (n 21 above) 21. Another reason given for the non-inclusion of *kafalah* in the Hague Adoption Convention regime was the need to avoid definitional problems with regard to long-term fostering arrangements so as to avoid complicating simple alternative child care arrangements.

136 See the 'Status Table' http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (accessed 6 August 2013).

with their caregivers in Italy. This position changed in 2005 by a decree of the Constitutional Court of Italy (347 of 29 July 2005). Based on this, the peculiarities of *kafalah* were recognised, thereby giving an opportunity for Muslim children from Morocco and elsewhere to be adopted and cared for under *kafalah*, by Muslims in Italy.

In 2008, the Italian Court of Cassation decided on the compatibility of the Islamic institution of *kafalah* with the Italian system.¹³⁷ A case had arisen based on the application by a Moroccan couple (legal immigrants in Italy) for a visa allowing a child (Hazem El Houary) to join them in Italy as their child under *kafalah*. The Ministry of Foreign Affairs which brought an appeal before the Court of Cassation argued that the law which permitted children to join their parents or guardians in Italy required strict interpretation and, since foster care but not *kafalah* was one of the permissible circumstances listed in the law, the refusal to issue a visa for Hazem to join the Moroccan couple was justified. The Court, however, held that the permissible circumstances in the law must be read in a 'constitutionally adequate' way, since only an interpretation which adequately balances constitutional values can be 'deemed to be consistent with the Constitution'.

In this case, 'the opposing values at issue are the protection of minors and the protection of the boundaries of the state from illegal immigrants'. Besides the fact that the couple in this case were legal immigrants, the Court decided that more importance ought to be placed on the protection of children, even if they are foreigners. In addition to this, the Court pointed out that *kafalah* was expressly recognised by CRC and Moroccan law and, as such, preventing the child from joining her guardians 'would penalise all legitimate or abandoned children coming from Islamic countries, and therefore violate the principle of equality'. The Court noted further that, 'for many of those children, the *kafalah* represents their only protection from abandonment'.

Under the French Civil Code, a foreign child may not be adopted where such adoption goes against his personal law or religion.¹³⁸ This agrees with the position of the CRC Committee on the subject, that is, adoption should be an available option to children of all religions, subject to the provisions of article 21 of CRC.¹³⁹ Thus, where adoption cannot be considered for Muslim children in need of care, *kafalah* of Islamic law should be considered before other forms of alternative care are reviewed.

137 For more details, see Court of Cassation Decision 19734/2008, available at *Polamar Osservatorio di diritto costituzionale* http://www.unisi.it/dipec/palomar/italy004_2008.html#4 (accessed 12 August 2014).

138 See arts 370-373 of the French Civil Code, cited in Mezmur (n 121 above) 295.

139 CRC Committee, Concluding Observations: India, February 2004 para 49(c).

Thus, in the case of *Harroudj v France*,¹⁴⁰ concerning the refusal of permission for a French national to adopt an Algerian girl child already in her care under *kafalah* of Islamic law, the European Court of Human Rights held that the refusal was not a violation of article 8 of the European Convention on Human Rights.¹⁴¹ Earlier in 2007 when she initially applied to adopt the child,¹⁴²

[t]he Lyons *tribunal de grande instance* noted that *kafala* gave the applicant parental authority, enabling her to take all decisions in the child's interest, and gave the child the protection to which all children are entitled under the international treaties. The court also pointed out that under the French Civil Code, a child could not be adopted if the law of his or her country – Islamic law in this case – prohibited adoption, which it did in the case of Hind Harroudj, as Algerian family law did not authorise adoption.

The decision was also held not to be discriminatory either against the applicant or the child on the basis of nationality, as *kafalah* is 'explicitly acknowledged by the New York Convention of 20 November 1989 on the Rights of the Child as protecting the child's best interests in the same way as adoption'.¹⁴³ As such, the decision was based not only on the provisions of the French Civil Code, but also in compliance with international law on children's rights, with reference to alternative care.

5 Conclusion

As discussed in the introduction to the article, the importance of children growing up within a family environment makes the subject of alternative care for children without parental care very pertinent and all avenues to ensure this ought to be explored. All the relevant international instruments on the subject provide for the realisation of this right and some of the measures that can be taken to realise appropriate alternative care for the affected children. However, one fact that comes out clearly is that securing appropriate alternative care for children without parental care cannot be achieved in isolation from the consideration of cultural and religious factors. Thus, an examination of Islamic *kafalah* as a form of alternative care is relevant. This is due to the fact that most scholarly works on children's rights which refer to *kafalah* only do so within the context of its prominence during the drafting process of CRC and not much more is known about *kafalah* in terms of what the concept entails, what its distinguishing features and legal implications are as well how it is practised.

140 *Harroudj v France* ECHR (4 October 2012) (Application 43631/09).

141 The right to privacy/respect for family life.

142 Netherlands Institute of Human Rights, Utrecht School of Law '*Harroudj v France*' <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfee7ec12568490035df05/9822050b81747d25c1257a8500506a55?OpenDocument> (accessed 12 August 2014).

143 As above.

In this article, attempts have been made to fill those gaps by examining the historical background to *kafalah*, its meaning, legal implications and practice, both domestically and internationally, as well as making a comparison between *kafalah* and other forms of alternative care. Even in Africa where many states (apart from those that have the Shari'a as state law) have considerably large populations of Muslims, *kafalah* is not widely known. This gap ought to be filled in view of the current wave of child law reform going on around the continent. This would make it possible for all children without parental care to get an opportunity for alternative care placement appropriate to their backgrounds. A case in point is Tanzania/Zanzibar where the new Children's Act applicable to the semi-autonomous region of Zanzibar makes provisions for *kafalah* in the alternative care context.¹⁴⁴

In light of the increasing mobility of families and children across international borders, it is important to understand the existing forms of alternative care so as to appropriately address the situations which arise from differences in cultural, religious and legal backgrounds. With regard to intercountry *kafalah*, it has been argued that the continued non-existence of international standards for regulating the transfer of children between states under *kafalah* raises practical problems, which 'may require the kind of regulations that are provided for in the 1993 Convention'.¹⁴⁵ A central conclusion to this is that, despite the non-inclusion of *kafalah* in the 1993 Convention regime, an understanding of the concept by the relevant authorities in various states would impact on a more logical and legal approach to the subject. This will guard against compromising the position and future of Muslim children in the public care and protection system with regard to alternative care by promoting the principles of equality and non-discrimination as in the Italian Court of Cassation case.¹⁴⁶ The support for CRC resulting in its almost universal ratification will also continue to be maintained when the subject of alternative care for Muslim is properly approached, subject to their best interests being secured. The manner in which the *Harroudj v France* case was handled highlights a proper understanding and approach for all parties involved.

In conclusion, the emphasis on the need to provide alternative care for children deprived of a family environment should be based on what form of care is most appropriate in particular cases and not on one form of alternative care being the best or most ideal. The best interests of the child remains the overriding principle in all matters affecting children and, since this is determined in particular cases, it must always be borne in mind that cultural, legal and religious factors impact on what emerges as the best interests of the child in particular

144 Sec 75 Part 8, Zanzibar Children's Act, 2010.

145 Duncan (1998) (n 97 above) 35.

146 Volkman (n 111 above) 390.

cases. This is the ideal approach that should underlie the subject of alternative care for all categories of children.